

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUAN LUIS LEONOR,)	4:05CV3162
a/k/a JUAN ARMAND,)	
)	
Petitioner,)	MEMORANDUM
vs.)	AND ORDER
)	
ROBERT HOUSTON,)	
)	
Respondent.)	

This matter is before the court on the petitioner's notice of appeal (filing 64), motion for certificate of appealability (filing 65), motion for leave to proceed in forma pauperis (filing 68), and on the clerk's recent memo inquiring into the petitioner's in forma pauperis status (filing 67). The notice of appeal is filed with reference to the court's memorandum and order of July 5, 2007 (filing 53), which denied the petitioner's application for habeas relief pursuant to 28 U.S.C. § 2254. Judgment was entered that same date (filing 54), and within 10 days thereafter the petitioner filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). The petitioner's Rule 59(e) motion was denied on October 24, 2007 (filing 63).

Before the petitioner's appeal can proceed, a certificate of appealability must issue. *See* Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2254 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c). *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In contrast, when a district court denies a § 2254 motion on procedural grounds without reaching the applicant's

underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when “the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

After careful consideration of the petitioner’s motion and accompanying 82-page brief, the court concludes, for the reasons that were previously set forth in the memorandum and order of July 5, 2007 (filing 53), that the petitioner has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c). Therefore, a certificate of appealability will not issue in this case.

The clerk’s memo correctly notes that the petitioner was permitted to proceed in forma pauperis in the district court. (See filing 8.) Because the appeal appears to be taken in good faith, even though a certificate of appealability will not issue, the petitioner may continue to proceed in forma pauperis pursuant to Federal Rule of Appellate Procedure 24(a)(3).

IT IS ORDERED that:

1. A certificate of appealability shall not issue in this case;
2. The petitioner’s motion to proceed in forma pauperis on appeal (filing 68) is granted; and
3. The clerk of the court shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

November 28, 2007.

BY THE COURT:

s/ Richard G. Kopf
United States District Judge